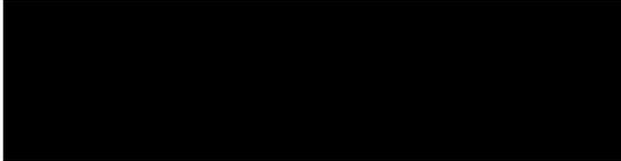




U.S. Citizenship
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FILE: WAC 06 149 51919 Office: CALIFORNIA SERVICE CENTER Date: DEC 26 2007

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.

James Blunzinger, for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a Persian architecture and construction business that seeks to employ the beneficiary as a construction manager/engineer. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition because the proffered position is not a specialty occupation.

Counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days. The AAO sent a fax to counsel on November 21, 2007, informing him that no separate brief and/or evidence was received, to confirm whether or not he had sent anything else in this matter, and as a courtesy, providing him with five days to respond. On November 28, 2007, counsel responded that he did not file a brief or evidence in support of this appeal. As such, the record is considered complete.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B, with counsel's statement. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) consistently interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner seeks the beneficiary’s services as a construction manager. Evidence of the beneficiary’s duties includes: the petitioner’s April 1, 2006 letter in support of the petition and counsel’s July 10, 2006 response to the director’s request for evidence. As stated by the petitioner, the proposed duties are as follows:

- Confer with supervisory personnel, owners, contractors, and design professionals to discuss and resolve matters such as work procedures, complaints, and construction problems;
- Plan, organize, and direct activities concerned with the construction and maintenance of structures, facilities, and systems;
- Schedule the project in logical steps and budget time required to meet deadlines;

- Determine labor requirements and dispatch workers to construction sites;
- Inspect and review projects to monitor compliance with building and safety codes, and other regulations;
- Interpret and explain plans and contract terms to administrative staff, workers, and clients, representing the owner or developer;
- Prepare contracts and negotiate revisions, changes and additions to contractual agreements with architects, consultants, clients, suppliers and subcontractors;
- Obtain all necessary permits and licenses;
- Direct and supervise workers; and
- Study job specifications to determine appropriate construction methods.

The director found that the proposed construction manager duties do not require a bachelor's degree in a specific specialty. Citing the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the director erroneously determined that a construction manager position is not a specialty occupation, and that the DOL finds that a construction manager position meets the requirements of a specialty occupation. Counsel also states that a bachelor's degree is normally required for a construction manager position in the petitioner's geographical area.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is that of a construction manager, who plans, directs, and coordinates a wide variety of construction projects, including the building of all types of residential, commercial, and industrial structures, roads, bridges, wastewater treatment plants, schools, and hospitals. See the *Handbook*, 2006-07 edition under the category of Construction Managers. The petitioner has not demonstrated that the proposed job duties entail the level of responsibility of this occupation. Counsel states in his July 10, 2006 response to the director's RFE that the petitioner's owner currently has no employees, and submits a copy of a real estate lot contract that "represents the beginning of [the petitioner's] first project." It is noted that the petitioner's owner is both the buyer and seller on this contract, the date of the contract has been altered, "Schedule 1" defining the terms of the contract is missing, and the contract appears to have been entered into after the filing date of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Moreover, the record contains no evidence that the beneficiary will be engaged in activities such as "[c]onfer[ing] with supervisory personnel, owners, contractors, and design professionals to discuss and resolve matters such as work procedures, complaints, and construction problems" and "[p]lan[ing], organiz[ing], and direct[ing] activities concerned with the construction and maintenance of structures, facilities, and systems." There are no contracts for construction, a portfolio of completed construction projects, or other indicia that the petitioner is engaged in construction. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). While some construction manager positions may require a 4-year degree, according to the *Handbook*, others require only experience in the industry. The evidence of record does not establish that the beneficiary will be employed in construction management activities requiring a 4-year degree.

Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).

Regarding parallel positions in the petitioner's industry, the record contains a letter from a homebuilder who asserts that all construction managers must possess at least a bachelor's degree in construction science or construction management. Although the writer also asserts that he submitted proof of the educational backgrounds of the construction managers for his business, the record as presently constituted contains no such documentation. Moreover, there is no evidence in the record to establish that the writer's home building business is parallel to the petitioner's business operations. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information

or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As the opinion of the writer does not take into account the petitioner's particular business operations, the AAO does not find it probative in this matter.

The record does not include sufficient evidence from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has not submitted sufficient documentation to establish that the duties of the proffered position involve duties that are complex or unique; rather the petitioner has provided a general description of the occupation without identifying any complex or unique tasks pertinent only to the petitioner's business that would elevate the position to one requiring the knowledge associated with a bachelor's degree in a specific discipline. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. In counsel's July 10, 2006 response to the director's RFE, counsel states: "Petitioner has not hired any Construction Managers in the past due to being founded in 2006. . . ." The evidence of record therefore does not establish this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) – the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The AAO here incorporates its discussion regarding the lack of concrete evidence substantiating the actual duties of the proffered position. As indicated in the discussion above, the record of proceeding contains inconsistencies and lacks evidence of specific duties that would establish such specialization and complexity. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation.

Although the director did not make a specific determination regarding the eligibility of the beneficiary to perform H-1B level services, the AAO observes beyond the decision of the director, that while the record contains an evaluation of the beneficiary's related employment experience, that evaluation is based on the duties described in the beneficiary's own resume. The record, however, contains no corroborating evidence such as a comprehensive description of the beneficiary's duties from his foreign employer to demonstrate the beneficiary's qualifications as required by 8 C.F.R. § 214.2(h)(4)(iii)(C). Thus, CIS cannot assess the credibility of the evaluation of the beneficiary's academic education. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in

the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). For this additional reason, the petition will not be approved.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.